here there is no other ground but the small amount of the claim, which is more than double the amount that entitles a defender to appeal for jury trial. It sometimes happens that the appeal is taken for the purpose of raising the question of relevancy, and it has been held, after the argument on the relevancy has been disposed of, that if the defender does not insist on a jury trial, we may send the case to a Lord Ordinary or remit to the Sheriff, whichever course may seem most expedient. But here the defender maintains his right to go a jury, and he is entitled to have the case remitted to a jury for trial.

LORD KINNEAR — I am of the same opinion. There is nothing in the nature of the case to render it unsuited to jury trial, and the smallness of the sum at stake is not of itself a sufficient ground for refusing to send the case to a jury.

The Court approved of an issue and sent the case to jury trial.

Counsel for the Pursuer—Wilson. Agent—David Crawford, S.S.C.

Counsel for the Defenders—H. Johnston—Macfarlane. Agents—Mackenzie & Kermack, W.S.

Wednesday, May 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MIDDLETON *v.* LESLIES.

(*Ante*, vol. xxx. p. 657.)

Property—Restriction on Building—Superior and Vassal—Feu—Disposition.

A superior who had erected a tenement containing dwelling-houses which consisted, some of four and some of three rooms, feued a piece of ground in the same street under the restriction that the vassal should be bound to erect on the ground disponed dwelling-houses "similar in style and quality," and not exceeding in height the houses already erected by the superior. The vassal erected a tenement containing dwelling-houses which consisted of three and two rooms each.

Held that the tenement erected by the vassal was not in violation of the stipulation in the feu-disposition.

In May 1889 Alexander Middleton, proprietor of the lands of Belmont, Aberdeen, feued a piece of ground on the south side of Belmont Road to Roderick M'Kay.

By the feu-disposition it was provided, *inter alia*, as follows—"The said Roderick M'Kay and his foresaids shall be bound within two years from the date of entry, under these presents, to erect on the ground hereby disponed, one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality to and not exceeding in height the houses already erected by me on the south side of Belmont Road foresaid, or cottages, or two-storey houses (which however shall have no attics therein for occupation as dwelling-places, other than personally by tenants or others occupying the first or second floors of such dwelling-houses, subletting of said attics being excluded), not inferior to those on the north side of said road, but having the north or front walls thereof built of dressed or hammer blocked ashlar work of granite stone, . . . and which building shall be of the value of at least £1000 sterling; and my disponee is hereby specially prohibited from placing in the roofs fronting to Belmont Road of the houses to be erected by him as aforesaid, projecting windows of any kind whatever, but such widows as are placed in the said roofs shall be flush with the same; but declaring that this prohibition does not apply to any cottages to be erected by my said disponee as aforesaid, the roofs of which may have projecting windows; and my disponee and his foresaids shall be bound to uphold and maintain the said buildings in good and complete repair, or to erect or maintain other buildings of equal value and quality thereon . . . in all time coming; and that as a security to me and my foresaids . . . for the due payment of the feu-duty hereinafter stipulated." . . .

In the same year Mr M'Kay disponed the subjects feued to him to Miss Isabella and Miss Helen Leslie.

In 1891 Alexander Middleton raised an action against the Misses Leslie to have them ordained forthwith to erect buildings in accordance with the terms of the feu-disposition, and in the event of their failing so to do within twelve months, or such period as might be fixed, for payment of damages.

On 19th May 1892 the First Division decerned the defenders (*ante*, vol. xxx. p. 657), in implement of the obligations contained in the feu-disposition, to erect within one year from that date one or more dwelling-houses, or shops and dwelling-houses combined, as specified in the summons and feu-disposition.

In January 1893 the defenders submitted to the pursuer the plan of the buildings which they proposed to erect, but the pursuer objected that the plan was not in accordance with the stipulations of the feu-disposition. The defenders, however, proceeded to erect the buildings in accordance with the plan, and in March the pursuer brought an action in the Sheriff Court of Aberdeen to have them interdicted from doing so. This action was subsequently ordered to be transmitted to the Court of Session *ob contingentiam*, and was conjoined with the action of implement and damages. Pending these proceedings the defenders completed the buildings which they had begun to erect.

The pursuer was afterwards allowed to amend his record in the Court of Session action by adding averments to the effect that the defenders' buildings were not in accordance with the stipulations of the feu-contract, but were inferior in style and

quality to the houses erected by him on the other side of Belmont Road, to which they ought to have been similar.

Proof was allowed. The evidence showed that the building erected by the defenders on the south side of Belmont Road consisted of a whole and a half tenement house. These were divided into dwelling-houses consisting of three rooms in some cases, and of two rooms in others. In the pursuer's tenement on the north of the street, the dwelling-houses consisted of four or three rooms each, and this was the dissimilarity of which the pursuer chiefly complained. It was not proved that the defenders' building was in any way inferior to the pursuer's so far as the quality of the material and workmanship were concerned. The pursuer led evidence to show that the smaller dwelling-houses in the defenders' tenement would attract an inferior class of tenant, and that this would have the effect of decreasing the value of his property. Contrary evidence was led for the defenders.

On 10th November 1893 the Lord Ordinary (KYLLACHY) pronounced this interlocutor —"Finds that the pursuer has failed to prove that the houses erected by the defenders are disconform to the conditions of the feu-charter; therefore assoilzies the defenders from the conclusions of the action raised in this Court, and dismisses the Sheriff Court action and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—The question in this case is whether a certain dwelling-house or tenement of dwelling-houses built by the defender on ground feued by him from the pursuer in Belmont Road, Aberdeen, is dissimilar in style and quality to a certain other tenement of dwelling-houses erected by and belonging to the pursuer and situated on the same side of Belmont Road.

"The pursuer contends that the defenders' buildings are thus dissimilar. He says they are inferior buildings or rather inferior dwelling-houses, and that he is entitled to damages in respect that their erection constituted a breach of the conditions of the defenders' feu—one of these conditions being that the feuar shall erect, within a specified time, 'one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality and not exceeding in height the houses already erected by the superior on the south side of Belmont Road aforesaid.'

"Upon the proof I am not able to hold that the defenders' tenement is dissimilar in style and quality to the pursuer's. Externally it is admitted that there is no difference between the two. The complaint is that the two tenements are differently sub-divided, the pursuer's tenement being divided into houses of three and four rooms, and the defenders' into houses of two and three rooms. This it is said implies a distinct difference in the probable class of tenants, and therefore that viewed with respect to occupation—that is to say, to the class of tenants—the houses forming the defenders' tenement are inferior to the houses forming the pursuer's.

"Now, upon the proof I am disposed to think that the houses within the defenders' tenement will probably be occupied by a lower class of tenants. Nay more, I do not know that I should object to say that the houses forming the defenders' tenement are by reason of their smaller size inferior in style and quality to the houses within the pursuer's tenement.

"But the question I think is not whether the houses within the two tenements—but whether the two tenements—are dissimilar in style and quality. The feu-charter no doubt speaks not of tenements but of 'dwelling-houses.' But what is meant by a dwelling-house is plainly a building, not a set of rooms within a building. In other words the tenements constitute the dwelling-houses to be compared, and that being so, the question, as I have said, is whether the two tenements are dissimilar 'in style and quality.'

"Now 'style and quality' have in my opinion reference not to the occupation of the subjects, or to their adaptation to this or that kind of occupation. The reference is to their style and quality as buildings, and compared as buildings it is I think impossible to say that the two are dissimilar. Externally they are the same, and the difference between them is not in the style and quality of the structures, but in the extent to which they are internally subdivided. I put it to the pursuer's counsel whether if the defender had erected, not a tenement divided into two-roomed houses, but self-contained dwelling-houses, or dwelling-houses divided into rooms say of six or eight rooms, the pursuer could still have objected; and he was obliged to admit that his argument went that length. But this, as it seems to me, reduces the pursuer's argument to an absurdity. The superior cannot be supposed to have prohibited larger houses than those in his own tenement, and if so, I do not see how he can be held to have prohibited smaller houses. The thing prohibited is, it will be observed, 'dissimilarity.'

"On the whole, I am of opinion that the pursuer's objection to the defenders' building is not well founded, and I must therefore find for the defenders in both actions with expenses."

The pursuer reclaimed, and argued—The defenders' building was to be "similar in style and quality" to the pursuer's on the opposite side of the street. "Style and quality" were words which applied not only to the external appearance of the tenement, but also to its internal arrangement. A tenement of houses was not to be judged of in the same way as a self-contained villa, by its external appearance only, and this distinguished the present case from *Moir's Trustees.* "Quality and style" applied not only to the whole tenement, but to each separate dwelling-house within it, and dwelling-houses of three and two rooms each differed in quality and style from dwelling-houses of four and three rooms each. The difference was material, for the smaller houses would attract an inferior class of tenant, and, as

the evidence showed, the value of the pursuer's property would suffer. The pursuer had therefore a right and interest to enforce the restriction—*Naismith* v. *Cairnduff*, June 21, 1876, 3 R. 863.

Argued for the defenders — The clause upon the construction of which the question between the parties turned, was one imposing restrictions upon the vassal's right to use his property, and the defenders were therefore entitled to ask the Court to read the clause liberally. In the clause the word "dwelling-houses" clearly meant the whole building, and it was the whole building which was required to be similar in style and quality to the house erected by the pursuer. "Style and quality" was a redundant expression; "quality" included all that was meant. The word only applied to the external appearance of the tenement and the material and workmanship, to which no stateable objection was taken, and had no reference to the internal sub-division or the occupation of the tenement — *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141; *Fraser* v. *Downie*, June 22, 1877, 4 R. 942, *per* Lord Shand, 945. If the construction contended for by the pursuer were upheld, the clause afforded no sufficient protection to the superior, as it would be open to the vassal to let the separate dwelling-houses to more than one family. Further, the pursuer had failed to prove that he would suffer damage.

At advising—

LORD ADAM—This action raises a question between a superior and a vassal. The superior founds upon a clause in the feu-contract which imposes on the vassal certain obligations with regard to the building of houses or tenements upon the feu. The state of matters at the present time is this—At a previous stage of the case we held that the defender was bound to implement the obligation laid upon him by building a certain house upon the ground feued to him. He sent a plan showing the house which he proposed to build, to the superior. The superior intimated in reply that he did not approve of the plan, but the vassal nevertheless built the house, and the question we have now to decide is, whether the house so built is in conformity with the stipulation of the feu-contract. The superior does not seek to enforce an irritancy against the vassal, but brings an action of damages, alleging that the manner in which the house has been built is not in conformity with the feu-contract, and that he has sustained damage owing to the vassal's breach of contract.

The clause in the feu-contract binds the vassal "within two years from the date of entry . . . to erect on the ground hereby disponed, one or more dwelling-houses or shops and dwelling-houses combined, similar in style and quality to and not exceeding in height the houses already erected by me on the south side of Belmont Road." It is then provided alternatively that the vassal may build cottages, and various other provisions follow, it being stipulated, for example, that the building to be erected shall be of the value of at least £1000. The vassal is also prohibited from doing certain things. The part of the contract which has formed the subject of discussion is the provision that the vassal shall erect dwelling-houses, or shops and dwelling-houses combined, "similar in style and quality" to the houses built by the pursuer on the opposite side of the street. A material dissimilarity is said to exist between the houses built by the vassal and the superior, and the dissimilarity is said to consist in this respect—The houses in the tenement built by the vassal consist of two or three rooms each, whereas those in the superior's tenement consist of four or five rooms each, and the objection taken is that the smaller houses attract tenants of an inferior class, and that the tenants are more numerous in number, with the result that there are more children about the street. That is in truth the leading objection, which is therefore one with reference to the internal construction, and not the external appearance of the building. The only objection stated to the external appearance is that the building erected by the vassal is one foot lower than that erected by the superior, but with reference to the observations which have been made on the use of the word "quality" in the feu-contract. I may say that in the matter of excellence of construction, no objection is taken to the building either externally or internally. It is not said that the masonry or carpentry are of different quality or inferior workmanship.

The question is, whether houses which differ in the manner I have described are of the same style and quality. With reference to the whole clause, the first observation which I have to make is that it does not deal with use and occupation, and so far as I see, the house once being erected, there is nothing to prevent the vassal introducing any number of tenants into it. He might let it out in rooms, and I say again that, so far as use and occupation are concerned, there is no prohibition of any kind in the feu-contract. Mr Jameson founded upon the fact that there was a prohibition imposed as regards cottages in the event of their being built, that the attics should not be let out separately from the first or second floors, but that prohibition has reference only to cottages, and the fact that it is imposed in the case of the cottages goes in my humble opinion to support the observation that there is no prohibition as to the use and occupation of the houses.

In the next place, the words "style and quality" refer to the whole building, and not to any particular portion of it. It is provided, for example, that the houses are not to exceed in height the houses erected by the superior, which clearly refers to the height of the whole tenement, and shows that the words "style and quality" refer to the house as a whole, and not to

the separate parts into which it may be divided.

If that is so, the question is whether the houses, so far as their external appearance and quality of construction and workmanship is concerned, are the same in style and quality. The Lord Ordinary is satisfied that they are, and I agree with the Lord Ordinary. I do not say that "style and quality" necessarily refer only to the external appearance. I think they may also refer to the internal construction so far as quality of material and workmanship is concerned. But these words do not in my opinion refer to the internal subdivision of the tenement, and the buildings being of similar quality and style in other respects, I cannot see that their difference in the matter of internal sub-division is such as to lead us to differ from the Lord Ordinary.

Lord M'Laren concurred.

Lord Kinnear—I am of the same opinion. I think Mr Abel was quite right in saying that when stipulations of this kind imposing restrictions upon rights of property are expressed in ambiguous terms, they must be construed *contra proferentem*, that is, against the superior and in favour of the vassal who is to be limited in the use of his property. I think that that general rule is applicable in this case, because the language used in the feu-contract is exceedingly vague. The houses which the vassal is taken bound to erect are to be similar in quality and style to those already erected by the superior. The superior says that he has erected a tenement of shops, offices, and dwelling-houses consisting of three or four rooms each, and he complains that the vassal has erected a tenement containing dwelling-houses, some of three and some of two rooms. The vassal's buildings therefore resemble the superior's in so far as they are tenements subdivided into dwelling-houses containing a very small number of rooms.

I agree with Lord Adam that the restriction in the feu-contract does not strike against use and occupation. The question therefore to be considered is, whether the division into houses of two and three rooms, instead of into houses of three and four rooms each, creates a dissimilarity in style and quality between the two buildings, and I cannot say that it does. If the superior intended to limit the sub-division which should be permissible to his vassal, he should have done so in express terms. I agree with Lord Adam that in order to satisfy the obligation of the vassal, his house should in material and workmanship be as good inside and outside as the superior's—but it is not said that the two houses are different in this respect.

The other differences seem to be immaterial. I should, however, have thought that the difference in height between the two tenements might have afforded the superior a ground of objection if the condition in the contract had stopped at the word "quality," but the following sentence contains a specific provision that the vassal shall not build higher tenements than the superior's, which seems to me to imply that the new buildings need not be of the same height as the old provided they do not infringe the specific restriction.

As to the general construction of the clause, it appears to me that some light is thrown upon the question what the superior meant by "style and quality," by a comparison of the clauses as to the different kind of buildings which the vassal may erect. He is bound to erect houses "similar in style and quality to and not exceeding in height the houses already erected" by the superior. But he (the vassal) is allowed as an alternative to erect cottages or two-storey houses subject to certain restrictions. The distinction seems to be between the general style of the houses already built and that of the cottages or two-storey buildings.

The Lord President concurred.

The Court adhered.

Counsel for the Pursuer — Jameson — Kemp. Agents—Henry & Scott, W.S.

Counsel for the Defenders—C. S. Dickson — Abel. Agents — Dalgleish, Gray, & Dobbie, W.S.

Friday, May 25.

FIRST DIVISION.

HOWARD'S EXECUTOR *v.* HOWARD'S *CURATOR BONIS* AND OTHERS.

Husband and Wife—Aliment—Claim of Widow for Aliment out of Estate of Husband.

A died intestate leaving a widow who was insane, but no children. He left personal estate which, after payment of debts and expenses, amounted to about £200. *Held* that the widow was only entitled to the moiety of the estate which fell to her as *jus relictæ*, and that A's executor was not bound to retain the other half of the estate, which fell to the next-of-kin, in order to provide for prospective claims of aliment to the widow.

George Frederick Howard died intestate on 26th April 1892. He was survived by his widow, who was insane, and also by his father, a brother, and a sister. He left no children. The deceased left personal estate amounting, after payment of debts and expenses, to about £200.

The present case was presented to the Court by (1) Mr Howard's executor-dative; (2) John Walker, C.A., who had been appointed *curator bonis* to the widow; and (3) the father, brother, and sister of the deceased, the judgment of the Court being craved on the following questions—"(1) Is the second party entitled in the circumstances to require the first party to retain the estate and apply it, so far as it will go, for the maintenance of the deceased's